IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 354

JOSEPH J. IMHOFF, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

REPLY TO MEMORANDUM FOR THE UNITED STATES

While the memorandum filed by the Honorable Solicitor General in opposition to the petition for Writ of Certiorari fails to rebut the principal reasons advanced by petitioner for granting the writ, it does raise several points about which clarification is in order. We reply to these briefly, as follows:

1. In referring to the monetary relief sought by petitioner before the Court of Claims (Opp. Mem., footnote 1), the government makes reference only to the income tax credit claimed for disability retirement benefits. The petition filed below also prays judgment

"for the difference in pay between that of a Lieutenant Colonel and a Colonel for the period 1 September 1953 through 30 November 1956".

2. The Solicitor General (Opp. Mem. p. 2) says the Inspector General "rejected" petitioner's contention "that he had not been sufficiently advised of the reasons for the action of the Physical Evaluation Record".[1] But this is not petitioner's contention at all. As explained at page 5 of our petition, it was the initial procedural defect by the Physical Review Council in August 1953 which was questioned. On this point, the president of the Physical Evaluation Board, Fourth Army, Colonel Edgar M. King, stated to the Fourth Army Inspector General that the Physical Evaluation Board itself did not know of the basis for the decision of Physical Review Council in disapproving his Board's findings.[2] It was this failure of the Council to furnish "the point of disagreement" which petitioner questioned and protested. The Inspector General did not reject petitioner's contention, but merely transmitted the reply from the Council to Fourth Army.

3. The Solicitor General points to a 1956 Efficiency Report (Opp. Mem. p. 3) to support an argument of non-disability. This standard form report prepared by a non-medical officer, covered a period of service when petitioner was assigned to limited duty in Washington, D. C. at which time he was undergoing medical treatment. On this assignment petitioner was able to be on

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[1] The Solicitor General probably means Physical Evaluation Board.

[2] See: Pls. Ex. 4, p. 13, of the record.

duty only about fifty percent of the time. This report had no relevance whatsoever to a disability determination, which could only be ascertained by a final-type physical examination.

4. The government's claim that allegations of procedural error are not germane nor substantial does not withstand either legal or factual scrutiny. Noncompliance with applicable laws and regulations invalidates the resulting action in any disability review process and so the Court of Claims has held. *Frederick* v. *United States,* 150 C.Cls. 769 (1960). The administrative decision must have been "conscientiously made." *Golding* v. *United States,* 131 C.Cls. 677, 680; 130 F. Supp. 628, 630 (1955). The incidents of noncompliance are plainly set forth in Sections I and II of our petition. The invalidity of these 1953 and 1954 proceedings would guarantee petitioner a disability retirement determination retroactive to the date his retirement would have been effected, had such errors not occurred—in this case, September 1, 1953.

From 1953 on, petitioner's retention in a duty status cannot be classed as "voluntarily" remaining in active service, as the Solicitor General alleges, in the face of (a) petitioner's 1953 tender of resignation (Pet. App. 14a), and (b) the several physical reports showing petitioner to be disabled. Since Army regulations do not permit a disabled officer to resign, petitioner was caught in the hopeless position of being unable to resign because of a disability finding and not being retired for disability by reason of the erroneous retirement process accorded him. His continuation in a duty status until 1956 was occasioned by this dilemna and was anything but voluntary. It was just the opposite.

5. The government argues that unless the 1956 Medical Board determination is found to be in error, petitioner cannot recover. As we have shown above, if the 1953 and 1954 proceedings were invalid, retirement entitlement commences at that time, and the 1956 proceeding requires no consideration whatsoever. But, as we have shown in our petition, the 1956 Walter Reed proceeding, particularly the Medical Board, instead of being "extensive" (Opp. Mem. p. 3) or "thorough" (Opp. Mem. p. 4) as the government contends, was replete with glaring irregularities (Pet. p. 14-15), unsupported by substantial evidence, and carried out in bad faith. There was no medical examination by the Walter Reed Board in 1956, virtually no consideration of petitioner's case by the Board. Its president announced the Board had previously arrived at its decision, and the Board's report of proceedings was prepared in advance—clearly a denial of the "full and fair hearing" guarantee of 10 U.S.C. 1214.

6. The suggestion that petitioner waited 8½ years, and thus inordinately delayed making known his objection to the prejudgment of his case on July 13, 1954, just simply is not a fair statement. The record clearly reveals that this irregular activity of the Army Physical Disability Review Board[3] was concealed from petitioner until the time of trial some 8½ years later. In fact, the petitioner upon learning of the prejudgment was most prompt in making his objections known to the court below. That the telegraph message of the Adjutant General to the Commanding General of Brooke Army Hospital constituted a prejudgment of

[3] The Solicitor General probably means Physical Disability Appeal Board (Opp. Mem. p. 5).

petitioner's case, as stated in Section I of our petition, is beyond question.

7. The government contends that the lengthy statements of August 21 and September 11, 1963 (Pet. App. 13a and 14b). show that petitioner "adequately understood the issue" raised by the Physical Review Council (Opp. Mem. p. 6). If this were so, the Fourth Army Commanding General would never have instructed his Inspector General to intercede, and the president of the Physical Evaluation Board would never have advised the Fourth Army Inspector General that the Physical Evaluation Board itself could not ascertain "the point of disagreement." Petitioner repeatedly sought to ascertain the medical basis of the Council's conclusion as to the "point of disagreement" between the Council and Physical Evaluation Board. The Department of Defense Directive, DA Pamphlet 21-48, (Pet. App. 37a) accords petitioner either the "right" to respond "on the point of disagreement," or to have the determination of the Physical Evaluation Board stand. But, if neither he nor others concerned had any idea as to what this point was, it was impossible to so respond. This is the procedural error.

8. In reply to the argument of lack of merit in point III of our petition, we submit that there is no doubt whatever that the court below "applied erroneous standards in determining whether petitioner was fit for duty", because the record clearly shows that for several years prior to retirement petitioner was qualified solely for, and did perform, only very limited desk duty as prescribed by and under the surveillance of Army physicians. To construe such physical capability as meeting the test for "performance of full military duty, field as well as garrison in both peace

and war" (*Weiner* v. *United States,* 148 C.Cls. 445 (1960)) demonstrates a complete lack of understanding as to what constitutes military duty.

9. Finally, the Solicitor General says the record establishes petitioner's fitness for duty and then goes on to rely on the actions of the Walter Reed Medical Board to support his position. This Board, which met November 21, 1956, was the eleventh such board before which petitioner appeared between 1953 and 1956. Its actions constitute a complete disregard of the long established statutory hearing guarantees and which have been summarized in our petition for a writ of certiorari. Even the Walter Reed Board Member-Recorder was unable at the trial in the court below to rehabilitate the proceeding irregularities of this Board (Tr. 241). The record shows that in every other instance in which petitioner appeared before a board of officers, i.e., 10 boards, he was found to be physically unfit for military duty—without the dissenting vote of a single board member.

CONCLUSION

For the reasons as set forth in our petition and in this reply, the petition for writ of certiorari should be granted.

Respectfully submitted,

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